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E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

October Term, 1970
No. 1228

LENERTE ROBERTS,
Petitioner

v.

STATE REAL ESTATE COMMISSION,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the State Real Estate Commission has the right to examine certain records of a licensed real estate broker under Subsection (11) (v) of Section 10 (a) of the Pennsylvania Real Estate Brokers License Act.

STATEMENT INVOLVED

The pertinent provisions of the Pennsylvania Real Estate Brokers License Act are set forth in the appendix to the Petition at pp. 50-53.

STATEMENT

This case concerns the refusal of the Petitioner, a licensed real estate broker, to permit an investigator for the Pennsylvania Real Estate Commission to examine Petitioner's escrow account. The inspector clearly informed Petitioner that the purpose of the inspection was to verify his escrow account (App. of Petition, p. 39).

Pursuant to this refusal, the Commission held a hearing at which the Petitioner offered no evidence in his behalf. The Commission found that Petitioner's refusal to permit the investigator to inspect the escrow account constituted a violation of Subsection (11) (v) of Section 10(a) of the Pennsylvania Real Estate Brokers License Act, and accordingly suspended Petitioner's license.

Petitioner's appeal of the Commission's action to the Dauphin County Common Pleas Court was dismissed.

In a per curiam order the Pennsylvania Superior Court, in a 4 to 3 decision, affirmed the Dauphin County Court.

The Pennsylvania Supreme Court affirmed the Superior Court in a 5 to 2 decision.

ARGUMENT

I.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

The question presented in this case was soundly laid to rest in *Shapiro v. United States,* 335 U.S. 1 (1948). In *Shapiro,* the Petitioner, a wholesaler of fruit and produce, was directed to appear before enforcement attorneys of the Office of Price Administration and to produce certain sales records relating to the sale of all commodities during a particular period of time. Petitioner appeared and produced the records, but claimed the constitutional privilege against self-incrimination. This Court held in *Shapiro* that the privilege did not apply to records required to be kept by food licensees under wartime OPA regulations. This holding permits inspection of records if the records (1) have "public aspects", (2) are obliged to be kept pursuant to a statute which was essentially noncriminal and regulatory in nature, and (3) are the type of records customarily kept in the course of business.

Clearly, the three elements set forth above are present in the instant case and require application, as the Court below ruled (App. of Petition, p. 42), of the "required records" doctrine established in *Shapiro.* Petitioner's escrow records have "public

aspects" (see *Shapiro*, supra, at 34). Certainly it is proper that brokers must maintain escrow accounts in real estate transactions in order that the public be protected from misuse of such funds, and that records of these accounts be subject to public inspection in order to determine if there has been compliance with the statutory requirement.

Furthermore, the pertinent requirements of the statute involved in the instant case are clearly imposed upon an appropriate subject of governmental regulation (see *Shapiro*, supra, at 35). Few would argue that it is not necessary to require real estate brokers to keep records and escrow accounts in real estate transactions.

Finally, it is equally clear that Petitioner's escrow records were records kept in the course of business and in no way can be deemed to be private or personal papers.

Moreover, the request to inspect in this case was entirely reasonable under the circumstances. The investigator for the Pennsylvania State Real Estate Commission made repeated attempts, without success, to contact Petitioner to conduct a routine examination and determine whether an escrow account had been properly established. When the investigator finally spoke to Petitioner, Petitioner was specifically informed that the investigator wished to make an inspection of Petitioner's escrow account. This request was flatly refused by Petitioner (App. of Petition, p. 39).

II.

THE CASES CITED IN SUPPORT OF THE PETITION ARE NOT APPLICABLE IN THIS CASE

An examination of the decisions of this Court cited in the Petition clearly discloses that none of them are applicable to the instant case.

For example, Petitioner cites (Petition, p. 6) the cases of *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Spevack v. Klein,* 385 U.S. 511 (1967); and *Gardner v. Broderick,* 392 U.S. 273 (1968), for the proposition that the acceptance of a license to engage in a business does not constitute a waiver of the constitutional privilege against self-incrimination. This Court held in *Garrity* that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits the use in subsequent criminal proceedings of statements obtained under threat of removal from office. In *Spevack* this Court held that a lawyer cannot be disbarred for professional misconduct solely because he refuses to produce demanded financial records or testify at a disciplinary proceeding on the ground of self-incrimination. *Gardner* held that a policeman who refuses to waive the protections which the privilege against self-incrimination gives him, may not be dismissed from office because of that refusal.

In the opinion in the *Gardner* case, 392 U.S. at 278, this Court points to the difference between the instant case and those cited by Petitioner:

> ". . . Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination."

Consequently, this Court has clearly distinguished between cases such as those cited by Petitioner, where testimony is sought or demanded for purposes of prosecution, rather than for, as in the instant case, the purpose of securing an accounting of one's performance of his public trust. As noted in the concurring opinion in *Gardner*, 392 U.S. at 285, that case provides a formula whereby ". . . public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their duties."

Petitioner next cites (Petition, p. 7) the cases of *See v. City of Seattle*, 387 U.S. 541 (1967), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), a standing for the proposition that a businessman may constitutionally refuse to permit an investigator of an administrative agency to examine his records without a formal subpoena or order. *See* held that the Fourth Amendment component of a suitable warrant procedure in order to effect unconsented administrative entry and inspection is applicable, in the context involved, to private commercial premises as well as to residential premises. But this Court stated as follows in *See*, 387 U.S. at 545:

> "We do not in any way . . . question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness."

The *Colonnade* case, which was concerned with a liquor licensee who refused admission to a federal inspector wishing to inspect liquor stored on the premises, was decided on its particular facts in accord with the ruling in *See* that problems of "licensing programs" requiring inspections must be resolved on a case-by-case basis. The reason this Court did not apply the general rule laid down in *See* explains the difference between *Colonnade* and the instant case. As noted by this Court in *Colonnade*, 397 U.S. at 76, Congress had broad power to design such powers of inspection under the liquor laws as it deemed necessary, but had nevertheless failed to make rules governing the procedure that inspectors must follow. On the other hand, Section 10(a) of the statute involved in the instant case (App. of Petition, p. 50) states that the Commission may "upon its own motion . . . investigate any action or business transaction of any licensed real estate broker . . ." and Section 10(a)(11)(v) (App. of Petition, p. 52), after describing with particularity required records, permits only the records described to be subject to inspection.

Finally, Petitioner asserts (Petition, p. 7) that the opinions of this Court in *Marchetti v. United States*,

390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); and *Leary v. United States*, 395 U.S. 6 (1969), all hold that the "required records" doctrine established in *Shapiro v. United States*, 335 U.S. 1 (1948), does not apply to every individual who enters a field required to be licensed by the State, and thus does not require him to surrender his constitutional guarantees against unreasonable searches and against self-incrimination. However, Petitioner has again failed to note that the facts in the instant situation are totally dissimilar to the circumstances in the four cases he cites. In each of those four cases, this Court indicated that the critical determination which interposed the shield of the privilege against self-incrimination was that the party, by the mere act of complying with the statutory requirement, was faced with a "real and appreciable" hazard of incrimination. *Leary v. United States*, 395 U.S. at 16. The mere act, in this case, of maintaining the escrow account records, of course, did not pose a real and appreciable hazard of incrimination. Moreover, whereas the statutes involved in those four cases sought primarily to compel incriminatory disclosures, the Pennsylvania Real Estate Brokers License Act and the inspection in the instant situation were concerned with assuring that regulations in the public interest were being followed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be dismissed.

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March 26, 1971